No. 49877-4-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MICHELE CALDWELL,

Appellant.

Appeal from the Superior Court of Washington for Pacific County

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Respondent's Brief

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I. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court properly admitted the check forged by Ms. Caldwell.

2. Sufficient evidence supported Ms. Caldwell's conviction of forgery beyond a reasonable doubt.

3. Findings were adequate.

4. Findings were adequate.

5. Findings were adequate.

6. Findings were adequate.

7. Findings were adequate.

8. The imposed legal financial obligations are mandatory.

II. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court properly admitted the forged check.

2. The written findings were sufficient and permitted review.

3. The trial court waived, in err in the State's view, a portion of the statutorily imposed financial obligations. The remaining $100 DNA and $500 Crime Victims Assessment are mandatory.

III. STATEMENT OF THE CASE

This matter proceeded to bench trial on October 18, 2016 before Pacific County Superior Court Judge Michael Sullivan.

Karen Kaino, a representative of Key Bank, testified that the check admitted as Plaintiff's 1 had been deposited through Key Bank's ATM into the account of Michele Caldwell. RP (10/18/16) 33-

34. She was able to determine Caldwell made the deposit and the specific item she deposited by the unique identifiers on the check which are made as part of the Key Bank system. *Id.* The check was identified as suspicious, as it appeared not to be a regular check of Lowell Gilbertson's,[1] but appeared to be a check that resembled checks that are drawn on credit products like credit lines or credit cards. *Id.* Surveillance footage, admitted without objection as Plaintiff's 2, further corroborated Michele Caldwell as the person depositing Gilbertson's check into the Key Bank ATM. RP (10/18/16) 35.

Lowell testified that he first met Michele Caldwell at a garage sale and the last time he had seen her was when she was loading her truck to move out of Gilbertson's home. RP (10/18/16) 12-13. Caldwell had been homeless and the Gilbertsons had allowed her to stay with them. RP (10/18/16) 14. Lowell was a customer at Key Bank and he had become aware of a questionable charge on his account through them. RP (10/18/16) 14. Lowell testified that Plaintiff's 1 was a copy of check that Key Bank sent him. RP (10/18/16) 15. Lowell testified that Plaintiff's 1 was a copy of a check

[1] Lowell and Bret Gilbertson, father and son, testified in this trial and will be referred to by their first names to avoid confusion. No disrespect is intended.

that banks send encouraging someone to simply write a check to open an account in order to receive money. RP (10/18/16) 15. Lowell said that this check at issue was purported to be written by him to his son, but his son's name was misspelled and even his signature was basically just a scribble. RP (10/18/16) 15, 17. He did not write the check which was printed with his name at the top. RP (10/18/16) 15, 16.

Bret Gilbertson testified that Caldwell came to live with him and his father in 2015 and she stayed with them for a few months. RP (10/18/16) 20. Bret testified that Plaintiff's 1 is a check written on his father's bank account. RP (10/18/16) 21. Bret indicated the check was supposedly written to him, yet his name is misspelled, and then purportedly endorsed by him and signed over to Michele Caldwell. RP (10/18/16) 21-22. Bret indicated the check was not written to him, was not from his father, and he did not sign the check over to Caldwell. RP (10/18/16) 22, 31. The first time he saw the check was when the investigating officer's showed him the check. RP (10/18/16) 12.

Caldwell was found guilty at the conclusion of the bench trial and timely appealed.

IV. ARGUMENT

A. ADMISSION OF THE CHECK WAS PROPER

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. This requirement is met "if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of authentication or identification." *State v. Bradford*, 175 Wn.App. 912, 303 P.3d 736 (2013), quoting *State v. Danielson*, 37 Wn.App. 469, 471, 681 P.2d 260 (1984). This standard was met in this matter.

1. Standard of review.

On review, a trial court's decision regarding authenticity is reviewed for an abuse of discretion. *State v. Payne*, 117 Wn.App. 99, 69 P.3d 889 (2003), citing *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). A court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981).

2. The check was properly admitted.

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. ER 901(a). Here, the instrument was deposited into a Key Bank ATM. The Key Bank representative was as a person with knowledge of their system and explained the distinctive characteristic which are marked on the check once it is deposited in the ATM. The item was further identified by the ATM photograph which was taken while Caldwell deposited the instrument. Next, the victims who purportedly authored the instrument agreed they had neither written the document nor approved for Caldwell to receive money as a result of the written instrument.

Further, Lowell Gilbertson testified that he and his son had given Caldwell a place to stay and it was not until after she left that they were contacted by Lowell's bank, Key Bank, about the fraudulently written instrument. Since it was not a usual check, but instead a counter-style check which is frequently sent to solicit the use of funds, it was not one he was familiar with as "his" checking account, which is at Key Bank. That said, he could identify himself as the person who owned the account, something evident with both

the account numbers on the bottom of the check and Lowell's name on the top of the check. Further, he could identify the person the check was written to, and finally the court could conclude, with the testimony from the Key Bank teller and the photograph, that Caldwell uttered or put off as true the written instrument with the intent to injure or defraud Lowell Gilbertson.

Appellant asserts there was insufficient evidence that the check in question belonged to the victim.[2] Actual ownership of the written instrument is not the issue (though the State would submit there is sufficient information to establish ownership), but instead whether Caldwell, with the intent to injure or defraud, falsely made or completed a written instrument; or put off as true, a written instrument which she knows to be forged. RCW 9A.60.020 (omitting other alternative means for brevity). Here, the evidence demonstrated the true owner did not make, complete, or authorize the check, and the evidence demonstrated that Caldwell put off as true a check purportedly written by both Gilbertsons with the intent to receive money she was not entitled to receive.

[2] Brief of Appellant at 7

B. THE FINDINGS OF FACT, CONCLUSIONS OF LAW ARE SUFFICIENT FOR REVIEW.

The trial court's findings of fact and conclusions of law are sufficient for review, especially in light of a sufficiency of the argument analysis as claimed by the Appellant. [3]

1. Standard of review.

A defendant challenging a trial court's finding of fact bears the burden of demonstrating that the finding is not supported by substantial evidence. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). A challenge to the sufficiency of evidence in support of a conviction admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010).

2. The findings of fact and conclusions of law are sufficient.

In criminal cases tried to the court without a jury, the court must enter written findings of fact and conclusions of law. CrR 6.1(d). An appellate court will not disturb the trial court's findings if they are supported by substantial evidence. *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973). A defendant challenging finding of fact bears

[3] Brief of Appellant at 11

the burden of demonstrating that the finding is not supported by substantial evidence. *Vickers* 148 Wn.2d at 116. Appellant, here, asserts the trial courts "conclusory findings do not enable Ms. Caldwell to make her claim on appeal that the state did prove her guilty of forgery beyond a reasonable doubt."[4] That assertion, however, does nothing more than attempt to sidestep the Appellant's burden pursuant to *Vickers*.

Moreover, any deficiency in the written findings and conclusions are subject to a harmless error analysis. *State v. Banks*, 149 Wn.2d 38, 43-44, 65 P.3d 1198 (2003). In so doing, a reviewing court must determine ""whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ' " *Id.* at 44, 65 P.3d 1198 (quoting *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). The test is whether "'there is a reasonable probability that the outcome of the trial would have been different had the error not occurred.... A reasonable probability exists when confidence in the outcome of the trial is undermined.'" *Banks*, 149 Wn.2d at 44, 65 P.3d 1198 (quoting *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995)). While the purpose of findings of fact is to enable an appellate court to determine the basis on which the case

[4] Brief of Appellant at 11

was decided in the trial court and to review the questions raised on appeal, inadequate written findings may be supplemented by the trial court's decision or statements in the record. See *Ford v. Bellingham-Whatcom County Dist. Bd. of Health*, 16 Wn.App. 709, 717, 558 P.2d 821 (1977), *Lawrence v. Lawrence*, 105 Wn.App. 683, 20 P.3d 972 (2001), citing *In re Labelle*, 107 Wn.2d 196, 728 P.2d 138 (1986). Appellant's reliance on *In re C.R.B*, 62, Wn.App. 608, 814 P.2d 1197 (1991) is misplaced, as in that matter the reviewing court determined it could not determine from the trial court findings whether it had satisfied the statutory requirements, something that could "not be corrected by relying on evidence presented at the dependency hearings."

Here, the trial court made the appropriate findings and conclusions. They are supported by the facts in the record which demonstrated that on April 21, 2015 Ms. Caldwell forged a financial instrument and deposited that instrument into Key Bank. She did so with the intent to take money from Lowell Gilbertson. Her actions were caught on the ATM camera and as such the verdict should not be disturbed for want of greater detail in the written findings of fact. The facts admitted at trial sufficiently speak for themselves.

C. LEGAL, FINACIAL OBLIGATION

Appellant seeks further review of Ms. Caldwell's mandatory legal financial obligations (LFO's), specifically the imposition of the $100 DNA collection fee pursuant to RCW 43.43.690, and the $500 victim assessment pursuant to RCW 7.68.035.

1. Standard of review.

The imposition of legal financial obligations by a trial court is reviewed for an abuse of discretion. *State v. Clark*,191 Wn. App. 369, 372, 362 P.3d 309 (2015).

2. Appellant has the ability to pay.

The statutory inquiry is required only for discretionary LFOs. *State v. Lundy*, 176 Wash.App. 96, 102, 308 P.3d 755 (2013) (mandatory fees, which include victim restitution, victim assessments, DNA fees, and criminal filing fees, operate without the court's discretion by legislative design); *State v. Kuster*, 175 Wn.App. 420, 424, 306 P.3d 1022 (2013) (victim assessment and DNA collection fee mandatory). Trial courts are not required to enter formal, specific findings. *Lundy*, 176 Wn.App. at 105, 308 P.3d 755.

Here, the trial court waived a portion of the mandatory fees, despite there being no evidence that Ms. Caldwell was unable to

meet her obligations. According to Ms. Caldwell's attorney, she has no prior criminal history, is 50 years old, and just finished college receiving a teaching certificate. RP (11/4/16) 64. While the Defense addressed a number of medications, there was no indication that she could not work. In fact, the Defense proposed community service rather than jail and outlined that Ms. Caldwell had already begun work at an adopt-a-pet center. RP (11/4/16) 66. The trial court further indicated it would take up any additional issues on payment on November 18, 2016, but the defense presented nothing further.

The State disagrees with the trial court's decision to waive all but the $100 DNA collection fee and the $500 victim assessment because nothing in the record supported the conclusion that a 50-year-old woman who just finished college and has a teaching certificate, who also worked (voluntarily) at an animal shelter, could not pay the statutorily-imposed legal obligations or reimburse the county $250 for her court-appointed attorney. In fact, all evidence appears to support the conclusion that waiving the costs was unsupported. Certainly someone volunteering who is also college-educated can work and pay their obligations. Regardless, the balance imposed appear to be mandatory and supported by the record. *State v. Mathers*, 193 Wn. App. 913, 376 P.3d 1163

(2016)(DNA and VPA fees are mandatory and imposition does not violate due process rights). Consequently, this Court should not further remove fees which were properly assessed.

V. CONCLUSION

The trial court properly admitted the forged check. There was sufficient evidence to support the conviction and while the findings of fact were thin, together with the record there is ample information for which review could be had. Because it is the Appellant's burden to demonstrate otherwise, their argument should fail and the verdict should not be disturbed.

RESPECTFULLY submitted this 6th day of July, 2017.

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